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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 330

PETER L. McDONNELL, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 31, 1932

CERTIORARI GRANTED OCTOBER 24, 1932

(37,027)

(37,027)

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE COURT OF CLAIMS

No. K-488

PETER L. MCDONNELL, Plaintiff,

v.

THE UNITED STATES, Defendant

1. PETITION—Filed November 4, 1929

To the Honorable the Chief Justice and Judges of the Court of Claims:

1. The plaintiff is an individual with his residence at 325 West End Avenue, New York, N. Y.

2. The plaintiff and the partnership of which he was a member during the year 1917—namely, McDonnell & Truda, 5 State Street, New York, N. Y.—duly filed their income-tax returns for the year 1917 and paid the taxes shown thereon to be due.

3. In March, 1923, the Commissioner of Internal Revenue made a jeopardy assessment against the partnership of McDonnell & Truda of an additional tax for the year 1917 in the amount of $100,005.14. On December 17, 1925, [fol. 2] the Commissioner advised the partnership that this assessment was erroneous and that the partnership had been overassessed to the extent of $75,141.86. The letter of December 17, 1925, states:

"The audit of the partnership cannot be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment."

4. Under date of February 12, 1926, the Bureau further advised plaintiff as follows:

"Reference is made to Bureau letter dated November 30, 1925, wherein you were advised that an audit of your

income tax return for the year 1917 resulted in the determination of a deficiency in tax of $6,877.62 due to assessment under the provisions of Section 210 of the Revenue Act of 1917 of the partnership of McDonnell and Truda, of which you are a partner, and requesting you to execute a waiver which was enclosed for the purpose, in order that adjustment could be made of the overassessment of $75,-141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Dominic A. Truda.

"You are, therefore, requested to execute and return to this office, the enclosed form of waiver within fifteen days from the date of this letter, in order that adjustment of [fol. 3] the partnership's overassessment and your resulting additional tax liability may be made."

5. On February 23, 1926, the plaintiff, acting under duress and in the fear of being arbitrarily penalized, both individually and through an increase in the partnership tax, submitted to the demand made upon him by the Treasury Department by filing a purported waiver of the statute of limitations for making any assessment for the year 1917; said waiver by its terms purported to extend the time within which the Commissioner of Internal Revenue could assess additional income taxes until December 31, 1926.

6. Under date of May 22, 1926, the Commissioner issued what is commonly called a thirty-day letter to the plaintiff. This letter proposed an additional assessment of $6,877.62 and enclosed a "Waiver of Right to File a Petition with the United States Board of Tax Appeals," which plaintiff did not execute. The letter provides in part as follows:

"If a protest is filed, any additional evidence or briefs of argument submitted will be given careful consideration, and if the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of section 274 of the Revenue Act of 1926. Should you not agree to the defi-

ciency as finally determined by the Commissioner, you will be allowed sixty days from the mailing of the registered letter in which to file a petition with the United States [fol. 4] Board of Tax Appeals for a redetermination of the deficiency."

7. Under date of May 26, 1926, plaintiff filed a protest against the proposed additional tax of $6,877.62 as set forth in Bureau letter dated May 22, 1926.

8. Under date of July 12, 1926, the Commissioner of Internal Revenue wrote plaintiff:

"After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that your contentions have been allowed, and the computation of tax as shown in your brief dated May 26, 1926, disclosing a deficiency in tax of $4,386.15, has been accepted as correct, and the case forwarded for assessment."

9. On October 9, 1926, the Commissioner assessed against the plaintiff an additional tax of $4,386.15 despite the provisions of section 274(a) of the Revenue Act of 1926, which provides:

"Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282 or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint [fol. 5] or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60 day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such

proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

Plaintiff has not waived this statutory requirement.

10. On October 23, 1926, plaintiff paid to the collector of internal revenue for the Second District of New York $4,549.03, which included the deficiency referred to in paragraphs 8 and 9 together with interest. Two claims for the refund of the amount were duly filed and were denied under dates of February 9, 1929, and July 25, 1929.

11. The claims for refund filed by this plaintiff were based on the contentions that the waiver filed by this plaintiff was invalid; that this tax was collected after the running of the statutory period of limitation applicable thereto, and that the Commissioner of Internal Revenue failed to follow the specific statutory provisions relative to the assessment and collection of the tax.

12. The statutory provisions relied upon, in addition to Section 274(a) of the Revenue Act of 1926, are:

The Revenue Act of 1924:

[fol. 6] "Sec. 277(a) (2). The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1918, * * * shall be assessed within five years after the return was filed, and no proceedings in court for the collection of such taxes shall be begun after the expiration of such period."

"Sec. 278(c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

The Revenue Act of 1926:

"Sec. 1106(a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of

such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

The Revenue Act of 1928:

"Sec. 276(b). Waivers.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the [fol. 7] tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

"Sec. 607. Effect of Expiration of Period of Limitation Against the United States.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (Whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

13. By reason of the action of the Commissioner of Internal Revenue in refusing to refund to this plaintiff the sum of $4,549.03, together with interest from the date of payment, the whole of said amount, plus interest, is now wrongfully and unlawfully withheld from the plaintiff without his consent and against his will by the United States.

14. No other action has been had on said claims in Congress or by any of the departments; no other person than the plaintiff is the owner thereof or interested therein; no assignment or transfer of these claims, or any part thereof or interest therein, has been made; plaintiff is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The plaintiff has at all times borne true faith and allegiance to the Govern-

[fol. 8] ment of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Wherefore plaintiff asks judgment against the United States in the sum of four thousand five hundred and forty-nine dollars and three cents ($4,549.03), with interest thereon from date of payment.

Peter L. McDonnell, by Robert Ash, Attorney for Plaintiff, Munsey Building, Washington, D. C.

Duly sworn to by Peter L. McDonnell. Jurat omitted in printing.

[fols. 9 & 10] II. General Traverse—Filed December 14, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission of Case

On October 13, 1931, this case was argued and submitted on merits by Mr. Robert Ash for the plaintiff, and by Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

[fol. 11] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Littleton, J.**—Entered May 31, 1932

Mr. Robert Ash for the plaintiff.

Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

Plaintiff sues to recover $4,549.03, with interest, income tax paid for 1917, on the ground that a waiver of the stat-

ute of limitation executed by him was invalid and that the tax was therefore collected after the expiration of the statute of limitation.

Special Findings of Fact

1. Plaintiff filed his individual income-tax return for 1917 April 1, 1918, and paid the tax shown thereon to be due. The partnership of McDonnell & Truda, of which he was a member during 1917, filed its return of income on Form 1065 on April 1, 1918, and paid the profits tax computed thereon under section 209 of the revenue act of 1917.

March 18, 1923, the commissioner made a jeopardy assessment of $100,005.14, excess-profits tax for 1917, against the partnership and a claim in abatement was filed protesting the amount of the tax assessed.

2. November 30, 1925, the Committee on Appeals and Review having considered the case of the partnership and having recommended that the profits tax of the partnership for 1917 be computed under the special-relief provisions of section 210, revenue act of 1917, the commissioner wrote the plaintiff the following letter:

"Reference is made to the appeal dated March 24, 1924, of the partnership of McDonnell and Truda, 5 State Street, New York, New York, of which you are a member, for assessment of its excess-profits tax for 1917 under the provisions of section 210 of the revenue act of 1917.

"You are advised that consideration of the application has been completed, indicating an overassessment of $75,141.86. However, a reduction of the excess-profits tax liability of the partnership necessitates a corresponding increase in the distributive interests of the partners and a corresponding increase in the taxable net income, resulting in additional tax liability for each partner. Your additional tax liability is $6,877.62.

[fol. 12] "Inasmuch as the limitation of time within which to assess the $6,877.62 has expired, you are requested to execute and return to this office the enclosed form of waiver, to facilitate the adjustments of the partnership's overassessment and your resulting additional tax liability."

3. On December 17, 1925, the commissioner mailed the following letter to the partnership:

"Receipt is acknowledged of your letter dated December 10, 1925, wherein you state that a letter has not as yet been received by you showing the amount of income and excess profits tax finally determined to be due for the year 1917, and requesting that this letter be forwarded before compliance with the request of this office in bureau letters dated November 30, 1925, that waivers be furnished for the partners, Peter L. McDonnell and Dominic A. Truda.

"In the letters to Peter L. McDonnell and Dominic A. Truda mentioned above, they were advised that an audit of the partnership of McDonnell and Truda under section 210 of the revenue act of 1917 resulted in the determination of an overassessment of $75,141.86.

"The audit of the partnership can not be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment."

4. February 12, 1926, the Bureau of Internal Revenue, not having received a reply from the plaintiff to the letter of November 30, 1925, again wrote him as follows:

"Reference is made to bureau letter, dated November 30, 1925, wherein you were advised that an audit of your income-tax return for the year 1917 resulted in the determination of a deficiency in tax of $6,877.62 due to assessment under the provisions of section 210 of the revenue act of 1917 of the partnership of McDonnell and Truda, of which you are a partner, and requesting you to execute a waiver which was inclosed for the purpose, in order that adjustment could be made of the overassessment of $75,141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Dominic A. Truda.

"You are, therefore, requested to execute and return to this office the inclosed form of waiver within fifteen days from the date of this letter in order that adjustment of the partnership's overassessment and your resulting additional-tax liability may be made."

February 23, 1926, plaintiff and the commissioner consented in writing to the assessment and collection of any tax determined to be due by the commissioner for 1917 beyond the period of limitation provided in the statute. This consent waived "the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts, to the extent of $6,877.62 conditioned upon the proposed additional assessment against McDonnell & Truda for the year 1917 of excess-profits tax, the sum being fixed at $24,863.28." This waiver was accompanied by a letter signed by plain-[fol. 13] tiff's representative and attorney in fact, dated February 23, 1926, in part as follows:

"Agreeable to your request, these waivers have been signed and are herewith inclosed * * *.

"I wish to state that it has always been the desire of these two gentlemen to pay all the income taxes justly due from them without any attempt to evade such payments by any means whatsoever * * *.

"When the waivers for 1917 were requested by you they were not withheld in an effort to evade the tax, but it would impose a great hardship on them to surrender a statutory right, which would inflict a tax of some $12,000.00 on them * * *. However, as an evidence of good faith, these waivers have been signed and forwarded to you.

"In requesting a conference I feel sure that by getting together with your conferee in Washington we can finally arrive at an amount which is acceptable to the commissioner and Messrs. McDonnell & Truda, which amount can then be paid and all tax matters for 1917 closed once and for all. We have no desire to take any part of the taxes in controversy before the Tax Board and are quite eager to settle it as expeditiously as possible within the Internal Revenue Department. The waivers are sent along with this letter as evidence of good faith in order that your conferee may feel thoroughly sure that no unfair advantage is sought by groundless appeals or other delays."

5. May 22, 1926, the commissioner mailed to the partnership a letter accompanied by a detailed statement showing his final determination of the 1917 tax liability of the part-

nership. This letter reduced the additional assessment made against the partnership of $100,005.14 to $24,863.28, and advised the partnership, as follows:

"You are advised that after careful consideration and review, your application for assessment of your excess-profits tax under the provisions of section 210 of the revenue act of 1917 has been allowed. Your excess-profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

* * * * * * *

"In accordance with the above conclusions, your claim for the abatement of $100,005.14 will be rejected for $24,863.28."

A certificate of overassessment was duly issued to the partnership.

6. May 22, 1926, the commissioner notified the plaintiff by what is commonly known as a "thirty-day letter" of a proposed assessment of a deficiency of $6,877.62 against him for 1917, as follows:

"An audit of your income-tax return for the calendar year 1917 has resulted in a determination of a deficiency in tax of $6,877.62, as shown in the attached statement.

* * * * * * *

"If a protest is filed, any additional evidence or briefs of argument submitted will be given careful consideration, and if the commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of section 274 of the revenue act of 1926. Should you not agree to the deficiency as finally determined by the commissioner, you will be allowed [fol. 14] sixty days from the mailing of the registered letter in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency."

There was inclosed with this letter to the plaintiff a "Waiver of Right to File a Petition with the United States Board of Tax Appeals." Plaintiff did not execute the waiver, but on May 26, 1926, filed written protest against the proposed additional tax of $6,877.62 and set forth a re-

computation thereof showing a deficiency due in the amount of $4,386.15, instead of the larger amount shown due by the commissioner's letter.

This protest was considered by the commissioner who thereafter, on July 12, 1926, notified the plaintiff of his final determination as follows: "After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that your contentions have been allowed, and the computation of tax as shown in your brief dated May 26, 1926, disclosing a deficiency in tax of $4,386.15, has been accepted as correct, and the case forwarded for assessment." Thereafter, on October 9, 1926, the commissioner made an assessment against the plaintiff of the additional tax so determined in the amount of $4,386.15. This amount, together with interest thereon, aggregating $4,549.03, was paid by the plaintiff to the Collector of Internal Revenue for the Second District of New York on October 23, 1926.

7. Thereafter plaintiff filed two claims for refund on December 27, 1928, and May 31, 1929, respectively, alleging that the consent filed by him waiving the statute of limitation was invalid; that the tax was therefore collected after the running of the applicable statutory period of limitation; and that the commissioner had failed to comply with the statutory requirements for the assessment and collection of the tax. These claims for refund were rejected on schedules dated March 6, 1929, and July 25, 1919, respectively.

Conclusion of Law.

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The first contention of the plaintiff is that the written consent executed by him waiving the statute of limitation

for assessment and collection of a deficiency against him for 1917 was executed after the expiration of the statute of limitation; that it was obtained by duress and was, therefore, invalid. He further insists that since the period of limitation for making an additional assessment for 1917 expired prior to June 2, 1924, and the waiver in question was given after that date and before the enactment of the revenue act of 1926, the waiver in question is invalid under the decision of the Circuit Court of Appeals for the Second [fol. 15] Circuit in Uncasville Mfg. Co. v. Commissioner, decided February 1, 1932. We find no merit in the contention of the plaintiff that the waiver was invalid because executed after the expiration of the statute of limitations, Stange v. United States, 282 U. S. 270, nor in the claim that it was obtained under duress.

The matter of the computation of the partnership's profits tax under the special-relief provisions of section 210 of the revenue act of 1917 was entirely within the discretion of the Commissioner. Williamsport Wire Rope Co. v. United States, 277 U. S. 551. Had the commissioner proceeded to collect from the partnership the excess-profits tax due by it under the normal tax provisions of the revenue act of 1917 on its income for that year, as he had a right to do, such tax would have amounted to $100,005,14, and there would have been no overassessment against the partnership and no additional tax due by the partners. It can not be said that a waiver executed by the plaintiff in order to obtain a reduction in the amount of the profits tax due by the partnership through a computation under the relief provisions of the statute was exacted by duress. He executed the waiver because it was to his advantage to do so. The commissioner was not required to compute the tax of the partnership under the special-relief provision, and had he declined to do so neither the partnership nor the plaintiff would have had any legal right to complain. Maas v. United States, 282 U. S. 822. Any adjustment in the profits-tax liability of the partnership necessitated a corresponding adjustment in the distributive interests of the partners and a reduction of partnership income increased the taxable income of the individual partners. The commissioner therefore advised the plaintiff and the other partner of McDonnell & Truda that if waivers of the statute of limitation with respect to their individual tax liability for 1917 should be

filed by them he would give consideration to the determination of the profits tax of the partnership under the special-relief provisions of section 210. Accordingly the plaintiff duly executed such waiver. He was not forced to do so, and the results obtained as a result of the execution of the waiver were favorable to him.

The case of Uncasville Mfg. Co., supra, holds that where the statutory period expired prior to June 2, 1924, waivers executed after that date and before the approval of the revenue act of 1926 were invalid.

We have carefully considered the decision of the learned Circuit Court of Appeals for the Second Circuit, but we are unable to concur in the conclusion that a waiver executed under such circumstances is invalid and that a tax collected on the basis thereof must be refunded. Burnet v. Chicago Railway Equipment Co., 282 U. S. 295; Brown & Sons Lumber Co. v. Burnet, 282 U. S. 183; Aiken v. Burnet, 282 U. S. 277; Stange v. United States, supra.

In the Uncasville case, the court said:

"Confessedly, had the time for assessment expired after June 2, 1924, the waivers would have been good, though executed after the expiry of the time to assess or collect. (Burnet v. Railway Equipment Company, 282 U. S. 295.) However, section 278 (c) of the act of 1924 declared that the section as a whole should not allow the assessment or collection of a tax, barred by existing limitations on June 2, 1924. Subdivision (c) of section 278 is necessary to the assess- [fol. 16] ments because they depend upon the waivers, and there was no other law regulating waivers in effect after June 2, 1924. Thus, if subdivision (c) confines subdivision (c) to cases where the assessment was not barred on June 2, 1924, the company is right. In spite of some intimation in Burnet v. Chicago Railway Company which, however, expressly reserved the point, we think that an analysis of section 278 as a whole does not admit of any other construction. * * *"

In none of the cases cited was collection barred on the date of the enactment of the revenue act of 1924; however, in Aiken v. Burnet, supra, a waiver had been given before the enactment of the revenue act of 1921, which fixed a limitation period of five years. The court held that the taxpayer

had sufficient authority, in the absence of any statute, to execute a valid waiver, and that the commissioner, under the same circumstances, had authority to accept such waiver and bind the Government. The court further held that a waiver signed is valid to extend the subsequently enacted limitation upon collection. Other waivers were secured in the Aiken case under the revenue act of 1921, and were held valid to authorize assessment on March 12, 1925. Again in Brown & Sons Lumber Co. v. Burnet, supra, the court infers that the last of the three waivers involved in that case would have been sufficient standing alone. A footnote in the opinion states, "Inasmuch as the second and third waivers were in themselves sufficient to extend the period for collection, the first waiver may be disregarded in this connection, as was done by the lower court. See 38 F. (2d) 428." In Brown & Sons Lumber Company case, supra, the first waiver was filed December 13, 1920, and the second on December 10, 1923; the third waiver was filed October 25, 1924. In the Uncasville Mfg. Company case the court construed section 278 (c) of the revenue act of 1924 as a prohibition upon the giving of a waiver by a taxpayer and the acceptance thereof by the commissioner. We are unable to find any provision in the 1924 revenue act which precludes a taxpayer from voluntarily waiving the benefits of the statute of limitation, nor do we find anything in such act prohibiting the commissioner's acceptance of such waiver. This view seems not to have been presented in the Uncasville Mfg. Company case, supra; it was not commented upon by the court in its opinion. The court merely stated that subdivision (c) of section 278 of the revenue act of 1924 limits the preceding subdivision (c) of section 278 so that subdivision (c) does not authorize the extension of time for assessment by a waiver executed after the enactment of the revenue act of 1924 where the time for assessment expired prior to the enactment of that act. In Burnet v. Chicago Railway Equipment Co., supra in footnote 5, page 300, to the statement in the opinion that "We need not determine whether respondent is correct in assuming that section 278 (c) qualifies section 278 (c) in respect to waivers on assessment of taxes barred prior to June 2, 1924," it is stated that "Subdivision (c) can not be said to qualify every other subdivision in section 278. Nothing indicates an intention to have it limit the effect of section 278 (a) which permits assessment to be made or suit

to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * *Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers.*" (Italics ours.) We conclude, therefore, that the revenue act of 1924 does not [fols. 17 & 18] preclude a taxpayer from waiving the benefit of the statute of limitation, and that a waiver given after the enactment of the revenue act of 1924, in a case where the statutory limitation had expired prior thereto, and before February 26, 1926, is valid.

The plaintiff next contends that the commissioner failed to comply with the statutory requirement of assessment and collection of the tax for the reason that he did not send to the plaintiff a notice of the deficiency, as required by section 274 (a) of the revenue act of 1926. We think this contention of the plaintiff is unimportant as affecting his right to institute a proceeding before the United States Board of Tax Appeals under the revenue act of 1926 upon receipt of notice of assessment, which would have constituted the commissioner's final determination had the commissioner failed to mail him a formal notice prior to assessment. However, the facts show that the commissioner fully complied with the requirements of section 274. May 22, 1926, the commissioner notified the plaintiff of a proposed assessment of a deficiency for 1917, allowing him thirty days within which to protest the same or to execute a waiver of his right to file a petition with the Board of Tax Appeals consenting to immediate assessment. The waiver was not executed, but plaintiff filed a protest setting forth that the correct tax was $4,386.15 instead of $4,549.03, as proposed by the commissioner in the thirty-day letter. The protest was considered and allowed and thereafter, on July 12, 1926, the commissioner sent the plaintiff a written notice of his final determination of a deficiency for 1917 in the amount of $4,386.15. This notice complied with section 274 (a) of the revenue act of 1926. The commissioner was not required specifically to advise plaintiff in this notice of his right to institute a proceeding before the board. The plaintiff did not institute a proceeding before the Board of Tax Appeals with respect to this deficiency and thereafter, on October 9, 1926, more than sixty days after the mailing by the commissioner of the notice of his final determination, the commissioner assessed the deficiency and collected the same Octo-

ber 23, 1926. Section 274 (a) of the revenue act of 1926 does not require any special form of notice, but provides only that if the commissioner determines that there is a deficiency he is authorized to send notice of such deficiency to the taxpayer by registered mail. The notice of July 12, 1926, which was received by the plaintiff, complied with this requirement.

The petition is dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge, and Booth, Chief Justice, concur.

[fols. 19 & 20] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 31st day of May, A. D., 1932, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the Court decides as a conclusion of law that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law. No printing having been done by the Court, no costs are taxed.

[fol. 21] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 37,027. Court of Claims. Term No. 330. Peter L. McDonnell, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1932. File No. 37,027.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted, limited to the question of the validity of the waiver under Sec. 278 (c) of the Revenue Act of 1924.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.